

court construes the “Notice” as a Motion under Rule 41 of the Federal Rules of Civil Procedure.

Pursuant to Rule 41(a)(1), plaintiff may voluntarily dismiss an action “without order of court (I) by filing a notice of dismissal at any time *before service by the adverse party of an answer*..., or (ii) by filing a stipulation of dismissal *signed by all parties who have appeared* in the action.” Fed.R.Civ.P. 41(a)(1) (emphasis added).

This action was filed on June 14, 2004 (doc.1), and service of process was issued on the named defendants (doc.2). Returns of service on the Thomases were filed on July 1, 2005 (doc.3), and their responsive pleading, i.e., their Answer, was filed on July 8, 2004 (doc.4).

On October 5, 2004, this court issued a Show Cause Order regarding service of process on the other named defendants, HR Builders, LLC, Jim Walley, and Michael Walley (doc.5). Plaintiff responded and was granted an additional thirty days within which to proffer proof of service (doc.8). Returns of service for HR Builders, Jim Walley, and Michael Walley were filed on October 27, 2004 (docs.10-12), and their responsive pleading, their Answer, was filed on November 15, 2004 (doc.15). Thus, all defendants have appeared. Therefore, to voluntarily dismiss this action under Rule 41(a)(1), a stipulation is required.

Plaintiff’s Motion to voluntarily dismiss this action (doc.35) does not comply with Rule 41(a)(1). Further, plaintiff does not state whether the requested dismissal is with or without prejudice or how costs are to be allocated.

Accordingly, it is ORDERED that plaintiff’s Motion to voluntarily dismiss (doc.35) be and is hereby DENIED without prejudice to be refiled in compliance with Rule 41(a)(1). Upon full compliance with the Rule, the Stay will be lifted and this action will be dismissed.

DONE this 17th day of November, 2005.

S/Virgil Pittman
SENIOR UNITED STATES DISTRICT JUDGE